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No. 85-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF OPPOSING MOTION TO AFFIRM

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The Government's motion to affirm fails to rebut the jurisdictional statement's showing that the district court's findings with respect to the racial motivation for the city's annexation policy are clearly erroneous.[1]

The district court below and the Government here summarily describe Pleasant Grove's annexations since

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[1] This case was adjudicated entirely on a written record. Accordingly, it presents the issue whether the "clearly erroneous" standard applies to appellate review of findings not based on credibility determinations despite this Court's statement in *Anderson* v. *Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-9, that the "clearly erroneous" standard does apply in such

1945 in an attempt to show that its annexation policy was racially motivated, but among all of these annexation decisions the only one on which the Justice Department based an objection under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973, was the decision not to annex Pleasant Grove Highlands. The 1945 annexation of a vacant 40-acre tract to the southeast of the city took place before the passage of the Voting Rights Act. The 1967 annexation was approved by the Justice Department and has brought approximately 36 (non-voting) black residents into the city. Pleasant Grove attempted in 1981 to drop the annexation of the Glasgow Addition when the Government demanded that Pleasant Grove seek preclearance. That annexation is before this Court only because the district court ordered Pleasant Grove, against its express wish, to seek pre-clearance. The Justice Department did not condition approval of the Western Addition on Pleasant Grove's reconsideration of its refusal to annex the Sylvan Springs, Kohler, or Westminster Subdivision areas, all of which are inhabited by white persons, nor Pleasant Grove's failure to annex the Woodward School, an area apparently containing no voters, or Dolomite, an economically depressed racially-mixed area. Approval for the annexation of the Western Addition was conditioned only on annexation of Pleasant Grove Highlands. The simple fact is that Pleasant Grove Highlands was the first black area to be contiguous to Pleasant Grove and thus available for annexation under Alabama law which was arguably equal economically and thus a plausibly rational choice for annexation.

circumstances, if (1) this Court does not agree that the district court's findings were clearly erroneous, and (2) if, as Justice Blackmun wrote in his separate opinion in *Anderson*, *supra*, the Court's statement on that issue was not a holding.

The Government's motion to affirm portrays Pleasant Grove's "annexation policy" as selecting white islands in the racially mixed sea of Jefferson County (Motion to Affirm, p. 2). This is inaccurate in two respects. First, Pleasant Grove expanded in an all-white sea until after the 1967 and Glasgow Addition annexations and the development of the Pleasant Grove Highlands subdivision during the 1970's.[2] Second, there is no evidence on this record that Pleasant Grove ever attempted to persuade annexable areas to become part of Pleasant Grove. The annexable areas persuaded the councilmen of the City to take them in, presumably for the same reason Pleasant Grove Highlands wants to be annexed, to wit, to obtain a dollar's worth of city services for taxes of twenty-eight cents or less. Pleasant Grove can have no racial motivation to bring in white areas to defend its internal white majority. It has always been for voting purposes all white, and it has consistently annexed undeveloped areas in preference to relatively developed areas with white populations. Even the Glasgow Addition, the most densely developed of any area annexed, is only one-tenth as densely developed as Pleasant Grove Highlands.

[2] The Government's Exhibit 36 shows as of 1980 only three black or racially mixed census blocks contiguous to Pleasant Grove, to wit, Pleasant Grove Highlands, Dolomite, and a part of Maytown-Sylvan Springs Division, which is contiguous only to the Glasgow Addition and about which no details are on this record because it never petitioned for annexation or otherwise became an issue in this case. All the other areas surrounding Pleasant Grove are inhabited by white persons.

Thus, there is no basis for stigmatizing the City Council's February 5, 1977, decision to annex the Western Addition or any of its prior annexation decisions as racially based even if the subsequent refusal to act favorably on Pleasant Grove Highlands' April, 1979, petition was. Because the City Councilmen had no way of knowing that Pleasant Grove Highlands would petition two months later, no conceivable racial issue was presented to the council on February 5, 1979. Had the Western Addition and Pleasant Grove Highlands' petitions been presented to the City Council together on February 5, 1979, an otherwise rational, informed councilman who wished to minimize the presence of blacks in Pleasant Grove would have voted against both petitions because (1) the sale of any house in Pleasant Grove entails the possibility that a black person will buy it, and (2) any voting rights change invites the Justice Department to weigh in as an ally of those substantial forces in Pleasant Grove who affirmatively wish to integrate Pleasant Grove.[3] No aspect of the annexation of the Western

[3] These forces include most prominently Councilman Milton C. Russell whose company owned land in the Western Addition and whose company was among the plaintiffs in the case of *Wheeler, et al.* v. *City of Pleasant Grove,* Civil Action No. 78-G-1150-S, a case in which Russell, individually, was a defendant as a member of the City Council. This case involved according to the Government's brief "an exclusionary zoning ordinance that was struck down because of its racially discriminatory effect" (Motion to Affirm, p. 9). Such a conclusion is no doubt what plaintiffs wished, but the Court's final decision, which was filed below, specifically found that "the [racial] discrimination claim was totally without merit" (p. 4) and "the plaintiffs failed to prove any racial discrimination whatsoever" (p. 8) and "there was no showing of racial discrimination" (p. 20). Glen E. Parmley, a

Addition tends in any way to exclude blacks from or to minimize their voting rights in Pleasant Grove. The tendency of the annexation with respect to the black presence in Pleasant Grove, *de minimus* though it be, is to increase the black presence.

In any event, the Government's motion to affirm (p. 10) wholly fails to address the essentials of Pleasant Grove's economic argument, to wit, that if Pleasant Grove should decide to bring seventy-nine (79) already built homes into the city by annexing Pleasant Grove Highlands instead of building those homes within the city, the city would give up $45,820 in development fees from the 79 houses, and that additional tax revenue from an already developed area is unlikely to exceed 28% of the cost of additional services.

It is no answer to this argument that Pleasant Grove Highlands has sufficient undeveloped land for the construction of 80 new homes. Pleasant Grove's economic interest is best served by annexing land none of which is developed. Nor could Pleasant Grove rationally be persuaded to annex Pleasant Grove Highlands because the annexation would provide immediate tax revenue, since such increased revenue would constitute at most only 28% of increased expenditures.

According to the motion to affirm, the district court "specifically found the city's allegation that it had

councilman between 1968 and 1972 and the prime mover on the City Council with respect to the Glasgow Addition was, together with Russell and others, an applicant to approve plans for a 120-unit apartment complex in Pleasant Grove, which was the underlying issue in *Wheeler, supra.*

[undertaken a comparative economic analysis] was a sham" (p. 10). This is incorrect. The district court's finding as to a "sham" was that "reliance by the City on the committee's recommendation for its decision not to annex Pleasant Grove Highlands is a sham" (J.S. 6a). What is disturbing about that finding is that in the parties' submissions on the merits below both Pleasant Grove (main brief, p. 9) and the Government (brief p. 16) agreed, with appropriate citations to the record, that the committee made *no* recommendation to the City Council. Needless to say Pleasant Grove never argued that the city relied on a committee recommendation which according to its own argument was never made.

Pleasant Grove concedes that it made no "comparative economic analysis" of the consequences of annexing the Western Addition and Pleasant Grove Highlands before it approved the annexation of the Western Addition. The City Council simply did not know at that time that Pleasant Grove Highlands wished to be annexed. If Pleasant Grove had conducted a "comparative economic analysis" with respect to Pleasant Grove Highlands before the matter was in litigation, the Government would now argue disparate treatment because Pleasant Grove had never conducted any "comparative economic analysis" before acting on any previous annexation request.

Finally, the Government asserts that the City does not attempt to offer "any justification for its annexation of the fully developed Glasgow Addition, which the district court found had imposed a financial burden on the city" (Motion to Affirm, p. 11). This is inaccurate. The Government cannot consistently insist that the Glasgow Addition with four houses on forty

acres at the time of annexation, or .1 structure per acre, is fully developed if the Government also insists that Pleasant Grove Highlands is undeveloped because there is sufficient undeveloped land for 80 additional houses where at the time of annexation there were already sixty homes on sixty acres in Pleasant Grove Highlands, or one structure per acre. There may or may not be as much undeveloped land in the Glasgow Addition as in Pleasant Grove Highlands, but there is much less financially burdensome developed land in the Glasgow Addition and certainly the ratio of undeveloped to developed land, which is the relevant figure, is much higher in the Glasgow Addition than in Pleasant Grove Highlands.[4]

If Pleasant Grove can show that it loses $45,820 in development fees by taking seventy-nine already built homes into the city and that those newly built homes can only contribute 28% of increased expenditure in increased taxes, it follows inevitably that Pleasant Grove should not take the seventy-nine already built homes into the city. Because the Government in its motion to affirm does not take issue with either the $45,820 figure or the 28% figure,[5] Pleasant

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[4] Judge MacKinnon referred to the Glasgow Addition as "practically undeveloped" (J.S. 25a) but concluded that the annexation was approved as a personal favor to the Glasgow family (J.S. 17a-18a, n. 5). We concur with that conclusion on the whole, but at least Councilman Parmley considered the development potential of the land before annexation, and the Council's decision might have gone the other way if the land had not been "practically undeveloped."

[5] 28% is the outside figure. Below the Government conceded that 14% was the actual figure for the fiscal year ending September 30, 1980 (J.S. 23a-24a).

Grove's argument must be accepted and the district court's findings with respect to the city's racial motivation rejected as clearly erroneous.

WHEREFORE, for the foregoing additional reasons, appellant respectfully submits that the questions presented are so substantial as to require plenary consideration.

Respectfully submitted,

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